SUPREME COURT, U. S.

No. 74-468

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

CARLISLE WILSON WEBSTER .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below is styled *Webster* v. *Commonwealth*, Ky. 508 S. W. 2d 33 (1974). It is also printed in Petitioner's Appendix at pages 1a-7a.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

I. WHETHER THE ADMISSION, WITHOUT OBJECTION, OF A CO-DEFENDANT'S ORAL CONFESSION WAS A VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT OF CONFRONTATION.

Petitioner urges that his constitutional right of confrontation was violated when the Commonwealth introduced the testimony of Sheriff Maynard Nickell. Sheriff Nickell testified that the co-defendant, Mildred Spencer, made an oral confession implicating the petitioner. Spencer and the petitioner did not testify.

The Sheriff's testimony was not challenged or objected to until a motion for new trial was filed. In his motion for new trial the petitioner sought an admonition to the jury not to consider this evidence. The ground for new trial was as follows:

> "The Defendants' objection to the failure of the Court to properly instruct the jury on the weight of evidence to be considered against the Defendant Webster as regards the said confession and admission of the Defendant Spencer should have been sustained and remedied."

The Court of Appeals of Kentucky in its opinion agreed that petitioner could have prevented the use of the co-defendant's confession had he objected or requested a severance. The Court of Appeals, also, observed that the requested for relief was not made timely when the issue was raised for the first time in a motion for new trial.

The Court of Appeals of Kentucky is deciding this case made a decision on state criminal procedure and did not decide this issue on constitutional grounds. The Court of Appeals held under the Kentucky Rules of Criminal Procedure that instructions to the jury must state what the jury must believe from the evidence. Directions limiting the effect of evidence are not in the category of instructions submitting the law of the case to the jury. (Petitioner's Appendix, page 6a)

The only argument presented below in the trial court and on appeal to the Court of Appeals was whether the trial court should have admonished the jury as to the weight of evidence of the co-defendant's confession. The issue presented for review is not whether petitioner's

right of confrontation was violated but rather when was the trial court obligated to give the admonition.

The Court of Appeals held that the admonition should have been given at the time the evidence was received or least before the jury retired for its deliberations. (Petitioner's Appendix, p. 6a).

It is our contention that petitioner's argument must fail for the reason that petitioner's argument was not decided on constitutional grounds but rather on the Court of Appeals' interpretation of its Rules of Criminal Procedure. See *California* v. *Krivda*, 409 U. S. 33, 93 S. Ct. 32, 34 L.Ed. 2d 245 (1972).

Also, petitioner argues that the right of confrontation is such a substantial right that the Court of Appeals should have reached the substance of the issue even without an objection being made.

In response to this, we wish to point out to this Court that this argument was not advanced until after the Court of Appeals' opinion was delivered. Petitioner raised this argument for the first time in his petition for rehearing before the Court of Appeals of Kentucky. This Court is not obligated to reveiew an issue not argued in state court. *Moore* v. *Illinois*, 408 U. S. 786, 92 S. Ct. 2562, 33 L. Ed 2d 706 (1972) and *Hill* v. *California*, 401 U. S. 797, 91 S. Ct. 1106, 28 L. Ed 2d 484 (1971).

II. WHETHER THE COMMONWEALTH ATTORNEY'S CLOSING ARGUMENT WAS PREJUDICIAL TO PETITIONER'S RIGHT OF A FAIR TRIAL.

Petitioner urges that his Sixth Amendment right was violated when the Commonwealth Attorney referred to him as a "professional".

As petitioner stated in his brief, the Court of Appeals of Kentucky has long recognized the rule that attorneys must confine themselves to the facts in the record. (see cases cited in Petitioner's Brief, p. 22-23). The Court of Appeals has had no hesitancy in condemning overzealous prosecutors. The Court of Apepals held that a prosecutor's repeated references to the defendant's "track record" was prejudicial. *Messmear* v. *Commonwealth*, Ky. 472 S. W. 2d 682 (1971). In *Lynch* v. *Commonwealth*, Ky. 472 S. W. 2d 263 (1971) a reference to the defendant as a "professional" was held to be prejudicial.

Petitioner in his argument passes lightly over the Court of Appeals specific finding that it was a fair inference on the facts for the prosecutor to argue to the jury that petitioner was a professional thief. As the Court of Appeals stated in its opinion:

> "It would defy credulity to suggest that one who manufactures and carries special tools for opening locks and is able to relieve a locked vending machine of its contents in broad daylight under the open view of the employes and patrons of its owner without being detected could be anything other than a professional thief." (Petitioner's Appendix, p. 5a)

CONCLUSION

The trial court and the Court of Appeals of Kentucky decisions are clearly supported by the evidence and we urge that there is not presented here any constitutional issue of sufficient magnitude to warrent this Court's consideration. There is no showing that the Court of Appeals of Kentucky has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that Kenneth A. Howe, Jr. being a member of the Bar of this Court, have sent three copies of the foregoing to the Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202 and the Hon. William P. Bach, First National Bank Building, Jackson, Kentucky 41339, by first class mail, postage prepaid, this 19th day of November, 1974.

/s/ Kenneth A. Howe, Jr.
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